No. 10877

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

RINGLING BROS., BARNUM & BAILEY COMBINED SHOWS, INC., a corporation, and AL G. BARNES AMUSEMENT COMPANY, a corporation,

*Appellants,*

*vs.*

AMERICA OLVERA, also known as America Olvera Pollinger,

*Appellee.*

---

## APPELLANTS' REPLY BRIEF.

---

COMBS & MURPHINE,
LEE COMBS,
925 Pacific Southwest Building, Los Angeles 14,
GEORGE P. KINKLE,
JOHN S. HUNT,
502 Title Insurance Building, Los Angeles 13,
*Attorneys for Appellants.*



Parker & Company, Law Printers, Los Angeles. Phone TR. 5205.

## TOPICAL INDEX.

## TABLE OF AUTHORITIES CITED.

No. 10877

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

RINGLING BROS., BARNUM & BAILEY COMBINED SHOWS. INC., a corporation, and AL G. BARNES AMUSEMENT COMPANY, a corporation,

*Appellants,*

*vs.*

AMERICA OLVERA, also known as America Olvera Pollinger,

*Appellee.*

---

## APPELLANT'S CLOSING BRIEF.

---

The Appellee's reply brief opens on the first four pages thereof with a group of assumptions as to what the meaning of the court's former decision on this matter was. This was done in relation to his argument on the law of the case and assumes as its premise the fact that the evidence in the second trial was identical with that of the first. A careful study of these items themselves will disclose the fallacy of the same, and that few, if any of them, really comprise the judgment of the court in the former appeal. Some of these defects arise from co-mission, others from omission, notably No. 9, which recites only one definition of *what* gross negligence is. There are many other definitions. Departing then, for the moment from his argument, counsel presents what

he calls a statement of the case. We respectfully submit that appellee's statement is not borne out by the evidence, includes many exaggerations and untrue interpretations of the evidence, and differs in many material respects from that presented in appellant's opening brief. These differences appear from the record of the two briefs, and it will avail nothing to reiterate them now. Thereupon appellee presents what she chooses to call her reply to appellants' arguments in their opening brief, dealing with the same, more or less, in the order presented in appellants' opening brief. For that reason we will return to the titles adopted in appellants' opening brief in this our reply.

## POINT I.

### There Is No Evidence of Gross Negligence or Wilful Misconducts Sufficient to Support the Verdict in This Case.

In attempting to answer this point, counsel first seeks application of the law of Florida as to what constitutes gross, or any, negligence. We believe that the *locus delicti* prevails as to that particular point and accordingly in our brief have often cited Kansas law. In the first appeal in this case as we read it, the Court, on the subject of what law governed, decided only that the Florida law governed by contract, as to all matters concerning the application of or interpretation of the contract itself. We believe it to be silent on what would constitute negligence or gross negligence, as that point was not necessary to be decided, and was not decided and we believe the law of *locus delicti*

applies as to that. Quoting from 15 *C. J. S.*, Sec. 12, page 897:

> "It is thoroughly established as a general rule that the *lex loci delicti*, or the law of the place where the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases of torts or the actions therefor, * * *"
>
> 15 *C. J. S.*, Sec. 12, p. 897.

Thereupon in answer to this point, appellee attempts to set up the doctrine of the law of the case, claiming as her conclusion that the evidence was identical, or nearly so, in both trials. This is not at all the fact. A totally different, and entirely independent examination and cross- examination was made of plaintiff's key witnesses, being plaintiff herself and her husband, Mr. Pollinger. Several other witnesses were examined and testified in a different manner, and several new witnesses were produced during the course of the trial (Joe America Yacopi). Not only that, but the comparison of the testimony of America Olvera in the second trial will indicate what counsel writing this brief, industriously attempted and succeeded in doing. That is, we took the meaning of the Court's language in the opinion in the former trial when it said, "There was evidence from which the jury could *infer* . . . that there was either gross or ordinary negligence in setting up and maintaining the trapeze . . . and on the part of the net holders in failing to hold it under her . . ." We resolved that in the retrial of this case, there would be no loophole through which such inferences could be sustained. The success of our effort in that regard is apparent—clearly so—when we consider the testimony on the two points of negligence charged in this case.

1. **The Erection of the Apparatus and the Utter Impossibility of the Trapeze Swinging Normally, If True That One of the Figure Eight Hooks at the Top of the Trapeze Was Overlapped From Four to Six Inches, or Overlapped at All. [Pr. Tr. p. 224; p. 226.]**

This claim is irretrievably lost to plaintiff by reason of the fact that the trapeze swung evenly though not controlled in any way by her, notwithstanding the fact that the trapeze swung on two radii, one of which was from four to six inches longer than the other. [Pr. Tr. p. 226.] In establishing her answer in cross-examination to the reason why the lower bar was level when she undertook her act, she testified that when she looked up she saw the eight-hook tangled up and that the compensating factor was some other kind of a tangle-up on the same side of the trapeze as the eight-hook. This obvious fallacy would not have compensated for the difference in the length of the line and thus adjusted the level of the lower bar, but, on the contrary, would have exaggerated it and made it worse or more unlevel, unless such a compensating factor had really been on the other side of the trapeze. Her reason for selecting this adjustment obviously was that she knew that in the split second she claims to have looked (in order to sustain her claim of negligence)—she could not possibly have looked also over at the other side and found a maladjustment there. Bear in mind that she does not claim not to know what really caused the downfall of the trapeze, but does claim to know specifically what it was. Therefore, she does not have available to her any inference from that situation, having specifically stated just what it was. It is claimed that this contention is borne out by the fact that the trapeze hung lower on the one side than on the other just after the accident, while the reason for it so hanging undoubtedly was that

the employees of the circus had already started to lower the trapeze and that one side went down faster than the other. Nevertheless, if it is true, as claimed by appellee, that such was not the case, it serves conclusively to confirm the physical fact that the trapeze could not have been level when she mounted it in the first place. It goes without saying that if she mounted the trapeze in an unlevel condition at the outset, she has no claim for damages in this case. Examination of the evidence on the foregoing matters indicates that it was much more elaborate and clear in the second trial than in the first. [Pr. Tr. pp. 189-231.] This evidence forestalled any possible inference as to the foregoing of appellee's two claims that she had a right to recover.

**2. Even More Clearly and Conclusively the Cross-Examination Respecting the Location and Handling of the Net Deprived the Jury of Any Possible Inferences Concerning Its Management and Handling.**

In the first trial, little, if any, examination was made of the plaintiff or other witnesses on this subject. But in the second trial, it was elaborately gone into for the reason that again counsel preparing this brief, mindful of the statement of the Appellate Court in the first trial, urgently sought to establish no possibility of any inference regarding the facts concerning its operation. For that reason we established that the net was held in identically the same place and in the same manner as it had been held for six months before and exactly where directed by appellee. The only possible negligence plaintiff could, therefore, claim would be that the men in failing to move with the net and catch her with safety were grossly negligent. There can be no inference whatsoever regarding any other negligence on their part, in as

much as they did as she told them and approved. To say that there is evidence in this second trial from which it could be inferred that there was negligence, either gross or ordinary, in relation to either of the two items referred to, would be to state that the mere fact of the fall itself—the ultimate fact in this case—was one from which gross negligence could be inferred. Having in mind the ruling stated in cases in appellants' opening brief, that two seconds is too short a time upon which to predicate negligence, how can the court then do other than reverse this judgment in favor of appellants where it is evident that approximately 1.2 seconds were afforded the holders of the net to appraise the situation and catch America Olvera? Counsel indulges in his brief in two arguments of fantasy, not unlike those used before the jury when he said: "This company which had waxed rich and powerful and mighty upon the performance of ability of people like Miss America Olvera." [Pr. Tr. p. 666.] And again, he says, "We are a mighty corporation. We are the greatest circus in the world * * * Those are his words." [Pr. Tr. p. 694.] The arguments referred to are that the recital of the falling body rule is untrue, because a feather would then fall just as fast as a human body; and second, that the jury may not speculate on how long the arc on a swing of two different radii is. The jury and the court take judicial knowledge of laws of nature or physical facts, and these are physical facts. (Code of Civil Procedure, Sec. 1875, Subd. 8; *Varcoe v. Lee,* 181 Pac. 223, 180 Cal. 228.) A large number of cases is cited in Chapter One, Par. 2 of California Evidence Manual by McBain. The rule set forth in this text may be quoted as follows:

> "That the matter be one of common and general knowledge, that it be well established, and authorita-

tively settled, be practicably indisputable, and that this common, general and certain knowledge exists in the particular jurisdiction."

The falling body rule is correctly stated as follows:

"Acceleration as used in mechanics is a term denoting the rate of change in the velocity of the moving body. It is what the increment in velocity in a unit of time would be if the rate of change were uniform for that unit. When a body falls in a vacuum near the earth's surface, the increment in velocity is about 32.16 feet per second, and this is known as the acceleration of gravity."

Encyclopedia Britannica, Vol. I, p. 91-C.

It is, of course, true that the fall is determined by the pull of gravity which reaches its extreme at about the time when an object has fallen for one second. Likewise, this rule is fixed as at about the earth's surface, as above stated, and in a vacuum—mass, that is to say, the weight or density of a given object, does not in any way increase or retard this gravitation pull in a vacuum. A feather would fall just as fast as a steel marble in a vacuum at or near the earth's surface. A feather would not fall that fast outside a vacuum for the simple reason that a feather is a very large object of relatively small weight and the resistance afforded by the air in making its fall retards it greatly; whereas, a human body is a relatively compact and heavy mass and its rate of fall is retarded but very little by the air. Reduced to our own case, the fact of the matter is that the human body would fall but infinitesimally slower than a steel or lead marble, whereas, a feather with literally thousands of times as much space

per gram of weight exposed to the resisting air would fall much slower. It is extremely conservative to say that in a second the human body would fall at least 32 feet per second, even in the air, with the air's resistance against it. The rule regarding the radii of arcs can be amply illustrated by experimentation. If one hangs a bar on two lines, one of which is only slightly longer than the other, and swings the bar normally from the center, it will be obvious in a moment that the side with the longer radius will swing out farther at each end than the one with the shorter.

From the foregoing discussion it will be seen that the doctrine of the law of the case does not and cannot apply to this appeal. The facts in the first trial were vastly different from those brought out in the second trial, and while in the first trial there may have been the possibility of some inferences remaining open, in the second trial all possible inferences were removed, and it was made clear and definite from appellee's own testimony, that the way in which the accident happened repelled any inference of gross negligence.

On the doctrine of law of the case, we cite the California decision of *Madsen v. LeClair,* 13 P. (2d) 939, wherein the court held that when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the Appellate Court, that similar evidence

at a former trial of the cause was insufficient to justify a similar decision . . . and, if in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact.

In *Allen v. Bryant,* 100 Pac. 704, 155 Cal. 256, the court said *that the doctrine of law of the case is rarely, and in a very limited class of cases, applied to matters of evidence as distinguished from rulings of law.*

It is an interesting thing that in answer to our point, the facts to which we devote approximately eighteen pages of our brief, the answer appears on page 35 of counsel's brief in four lines. An interesting comparison to this is the fact that the answer to our last point in our brief, notably the prejudicial remarks by the court, to which we have devoted a little better than two pages (occupies) approximately 40 pages of the reply brief. We, of course, recognize that our point of bias and prejudice alone cannot avail us a reversal in this case. It is brought out because it existed in our judgment and should be brought out because it relates to other matters contained in our brief. It is apparent, however, from the attention we devoted to it that it is not our main point on appeal. Acceptance of it as the main point on appeal by appellee must indicate along with his slipping by the first opening point in our brief with only four lines of comment that he is trying to drag a herring across the trail of the real issue in this case.

## POINT II.

### The Court Erred in Giving Instruction 14-A.

We doubt that we could amplify much more than has already been said in our opening brief. On this point, suffice it to say that this was a formula instruction. The law is that formula instructions must contain all defenses. An examination of the record in this case will disclose that the first portion of this instruction did not. An examination of the second section of this instruction, commencing with the words "or if you find by such preponderance of the evidence . . .", conclusively establishes the error in giving it. The court in giving this instruction used the following language: "And that said defendants employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell." Now, had the court left out the words, "that they failed to catch plaintiff when she fell"—this half of the instruction would have violated only the elimination of the affirmative defenses in so far as the net was concerned, but as it stands it actually defines what the jury should find to be a grossly negligent manner; that is to say, a "manner that they failed to catch plaintiff". In other words, the grossly negligent manner, the court said, would certainly be to fail to catch plaintiff. That reopened the whole case on ordinary negligence, instructed the jury that they must find for the plaintiff even if no negligence occurred at all, but if defendants merely failed to catch America Olvera. We submit that such an instruction is conclusively and absolutely erroneous and cannot be repaired or corrected by any other instruction.

## POINT III.

### Independent Contractor.

We have dealt with this point adequately in our opening brief and will not add anything to the matter therein contained.

## POINT IV.

### Assumption of Risk.

We make the same comment as under Point III.

## POINTS V and VI.

We make the same comment as under Point III.

## POINT VII.

We have submitted the facts and circumstances upon which we based our claim of bias and prejudice. They are adequately and thoroughly set forth and we have already stated what reliance we have upon them.

To comment briefly on this subject of bias, may we suggest that it is a very remarkable thing indeed, that a trial court would order up on the appeal the entire statement that he made at the time of rulings on the motion for new trial. This was done on motion for appellee. It certainly is not a material consideration or matter for the Appellate Court. It merely serves to confuse and clutter up the Appellate Court record. Not only that, but the Court made a change in the record. Not only that, but the Court made a change in the record at the time of the motion to supplement the record on appeal, changing the answer of America Olvera concerning her citizenship. The Court did that on the mere statement of opposing counsel in contradiction to the statement made by our-

selves, and after the reporter had examined the record and stated that his notes were clear.

> "The Court: It is quite possible that the reporter may have misunderstood * * *
>
> Mr. Dewing is a good reporter but he is subject to mistakes as well as anybody and he is very willing to admit it if he does make a mistake. *He has looked at his record and his notes seem to be clear."* [Supp. Tr. of Record, p. 790.]

Now in the teeth of that and of the following remarks by the Court:

> "The Court: I have no independent recollection and I don't purport to base my rulings on any recollection whatsoever" [Supp. Tr. of Record, p. 800],

the Court did make an order changing that answer.

May we suggest that that supplemental record in itself is some indication of the very bias of which we complain in our Opening Brief.

Further comment upon bias and prejudice will only serve unduly to prolong this brief. We suggest to the court, however, that we do not intend to be led off from the real main, vital and important issues in this appeal by a voluminous answer to the many sharp things that are said in appellee's brief concerning ourselves.

Respectfully submitted,

COMBS & MURPHINE,
GEORGE P. KINKLE,
JOHN S. HUNT,
LEE COMBS,
By LEE COMBS,
*Attorneys for Appellants.*